93-26

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

CARL J. DUNCAN,

Plaintiff,

v.

WARREN H. COBB,
JACQUELINE R. GRIFFIN,
CHARLES M. HARRIS,
EARLE W. PETERSON, JR.,
and WINIFRED J. SHARP,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARL J. DUNCAN
Pro Se
459 Inkwood Lane
Tallahassee, FL 32310
(904) 674-5901, ext 172

QUESTIONS FOR REVIEW

On a motion to dismiss pursuant to Rule 12(b)(1), Fed.R.Civ.P., may a federal district court contrary to law deny due process and equal protection in order to grant an improper and illegal affirmative defense?

May the affirmative defense that district courts are barred to review final state court decisions be premised on known and admitted null and void non-final state court orders?

Does the affirmative defense that a federal district court is barred to review final state court decisions bar the district court from viewing the record(s) of state court actions to see if the decisions are valid and final in order to determine its own jurisdiction?

May a federal district court seek grounds to deny the jurisdiction vested in it by Acts of Congress in order to keep from hearing and determining an action Congress ordered it to determine but over which the district court seemingly has no desire to conduct?

May a federal court of appeals sanction a departure from the usual course of judicial proceedings and a departure from the essential requirements of law, the results(s) of which inflict irreparable harm on the injured party?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF PARTIES AND CORPORATE DISCLOSURE STATEMENT[1] ii

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OTHER COURTS 1

JURISDICTIONAL STATEMENT 1

LEGAL AUTHORITIES 2

PRELIMINARY STATEMENT 5

STATEMENT OF THE CASE 5

ARGUMENT 6

APPENDIX 12

1. MANDATE, Duncan v. Cobb, et al., 989 F.2d 1198 (11th Cir. 1993) 13

2. ORDER, Duncan v. Cobb, et al., Case No.: 92-139-CIV-ORL-92 (unpublished) 14

---

[1] All parties are listed in the citation on the cover. There are no interested corporations or subsidiaries.

3. Endorsed Order Denying Rehearing Duncan v. Cobb, et al., Case NO. 92-139-CIV-ORL 16

4. ORDER Duncan v. Duncan Case No. 89-12080-FD-D (18th Jud. Cir., Fla.) 17

5. ORDER OF DISMISSAL, Duncan v. Duncan, Case No. 89-12080-FD-D (18th Jud. Cir., Fla.) 19

6. MOTION TO DISMISS, Duncan v. Cobb, et al., Case No.: 92-139-CIV-ORL-19 21

7. Act of Dec. 29, 1979, Pub. L. 96-170, s. 2, 93 Stat. 1284, U.S.C., Title 28, s. 1343(a) 29

TABLE OF AUTHORITIES

CASES — PAGE(S)

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962) 8, 9, 11

Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) 10

Elliott v. Piersol, 1 Pet. 328, 7 L.Ed. 164, (1828) 9

Hoffman v. Jones, 280 So.2d 431 (Fla. 1975) 7

Hughes v. Rowe, 449 U.S. 668, 101 S.Ct. 173, 66 L.Ed.2d 163, (1980) 9

McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963) 10

Miller v. Fortune Insurance Co., 484 So.2d 1221, (Fla. 1986) 7

Peoples Natural Gas Co. v. Federal Power Comm., 127 F.2d 153, 75 U.S. App. DC 235 (1942), cert. den., 316 U.S. 700, 623 S.Ct. 86 L.Ed.2d 1769 9

Polk Co. v. Glover, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6, (1938) 8

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1970) 8

Smart v. Jones, 530 F.2d 64 (5th Cir. (1976), reh. den., 532 F.2d 1375, cert. den., 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168, reh. den., 429 U.S. 1125, 97 S.Ct. 1166, 51 L.Ed.2d 576 10

Thompson v. Tolmie, 2 Pet. 157, 7 L.Ed. 381, (1829) 9

OTHER AUTHORITIES

Amendment 1, U.S. Const. 10

Amendment 14 Section 1, U.S. Const. 10

Art. I S. 8(9), U.S. Const. 11

Art. I S. 8(14), U.S. Const. 10

Art. I S. 8(18), U.S. Const. 10

Art. III S. 1, U.S. Const. 11

Art. III S. 2, U.S. Const. 11

Art. VI(2), U.S. Const. 11

Rule 8(c), Fed.R.Civ.P. 7

Rule 12(b), Fed.R.Civ.P. 7

Rule 16.1, U.S. S.Ct. 11

Rule 16.2, U.S. S.Ct. 11

Title 28, United States Code, Section 1331 11

Title 28, United States Code, Section 1343 11

Title 42, United States Code, Sections 1983 11

Title 42, United States Code, Sections 1985 11

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OTHER COURTS

Duncan v. Duncan, Case No. 89-12080-FD-D,
Eighteenth Judicial Circuit (Brevard County, Florida)
ORDER dated May 23, 1990

Duncan v. Duncan, Case No. 89-12080-FD-D
Eighteenth Judicial Circuit (Brevard County, Florida)
ORDER OF DISMISSAL dated March 29, 1991

Duncan v. Duncan,
571 So.2d 482 (Fla. 5th DCA 1990)

Duncan v. Cowart,
584 So.2d 997 (Fla. 1991)

Duncan v. Duncan,
590 So.2d 427 (Fla. 5th DCA 1991)

Duncan v. Cobb, et al.,
92-139-CIV-ORL-19 (unpublished order)

JURISDICTIONAL STATEMENT

The "PER CURIAM: AFFIRMED" without opinion order of the United States Circuit Court of Appeals for the Eleventh Circuit was entered April 2, 1993. There was no motion for rehearing. This Court has jurisdiction pursuant to the Act of June 27, 1988, Public Law 100-352, 102 Statute 662, United States Code, Title 28, Section 1254(1).

LEGAL AUTHORITIES INVOLVED

"The Congress shall have power: * * * To constitute tribunals inferior to the Supreme Court." Art. I S. 8.(9), U.S. Const.

"The Congress shall have power * * * To make rules for the government...." Art. I S. 8.(14), U.S. Const.

"The Congress shall have power * * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Art. I S. 8.(18), U.S. Const.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Art. III S. 1, U.S. Const.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, and laws of the United States... ." Art. III S. 2.(1), U.S. Const.

"In all cases ... in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exception, and under such regulations as the Congress shall make." Art. III S. 2.(2), U.S. Const.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every State shall be bound thereby... ." Art. VI(2), U.S. Const.

"Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." Amend. 1, U.S. Const.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amend. 14 S. 1, U.S. Const.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws ... of the United States." Act of Dec. 1, 1980, Pub. L. 96-486, S. 2(a), 94 Stat. 143, U.S.C., Title 28, s. 1331.

Act of Dec. 29, 1979, Pub. L. 96-170, s. 2, 93 Stat. 1284, U.S.C., Title 28, s. 1343. (See Appendix)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Act of Dec. 29, 1979, Pub. L. 96-170, 93 Stat. 1284, U.S.C., Title 42, s. 1983.

"[I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State ... with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person ... to the equal protection of the laws;

"If two or more persons in any State ... conspire ... for the purpose of depriving, either directly or indirectly, any person ... of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth

in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery or deprivation, against any one or more of the conspirators." Act of 1979, Pub. L. 96-170, 93 Stat. 1284, U.S.C., Title 42, s. 1985(2)&(3).

PRELIMINARY STATEMENT

The petitioner is referred to as C. DUNCAN or the plaintiff and the respondents as the defendants. This is consistent with their designations in the district and circuit courts.

STATEMENT OF THE CASE

On February 11, 1992 C. DUNCAN, plaintiff, non-attorney pro se, filed in the United States District Court for the Middle District of Florida, Orlando Division a complaint against five judges of the Florida Fifth District Court of Appeal seeking mandatory injunctive relief for civil rights violations under the authority of the Act of 1871, Public Law 96-170, 93 Statute 1284, United States Codes, Title 42, Sections 1983 and/or 1985.

The plaintiff contended that the defendants refused to issue valid judgments and were denying his civil rights by issuing non-final null and void orders in violation of law. He stated numerous reasons. The defendants did not file an answer but did move for dismissal on grounds of judicial immunity, Eleventh Amendment Bar and lack of subject matter in that a federal district court is barred to review final decisions of state courts. (APPENDIX 6).

The plaintiff opposed the motion to dismiss and filed motions for separate trials and for a default on grounds that the defendants were challenging the court's authority to hear the action under Section 1983 but raised no objection to Section 1985 nor did they defend or answer that authority. The plaintiff also moved for an evidentiary hearing. The defendants did oppose the first two motions.

The district court denied the defenses of judicial immunity and Eleventh Amendment Bar but granted the defense of lack of subject matter jurisdiction on grounds it cannot review final state court decisions. (APPENDIX 2). The plaintiff moved for rehearing which was denied. (APPENDIX 3). The plaintiff then appealed.

On appeal the plaintiff noted that the defendants and the court by law must take as truth all averments of the complaint; that the trial court judge could not accept citations in West's Florida Cases as better evidence than the original or verified, conformed copy

thereof pursuant to law; that citations in West's Florida Cases does not give validity to null and void decisions; that the lower court is barred by the United States Supreme Court to enforce null and void orders or judgments; that a motion to dismiss is by law limited to the four-corners of the complaint and may not be extended to unwarranted affirmative defenses or the introduction of external evidence; that the plaintiff is entitled to an evidentiary hearing to defend against an affirmative defense if he asks for it; and that the court could not refuse to hear an action authorized by an Act of Congress.

The defendants argued that the district court did not err by dismissing the action for the reasons stated in the order. The appellate court affirmed the lower court's decision. (APPENDIX 1).

ARGUMENT

The plaintiff seeks certiorari of the decision of the United States Eleventh Circuit Court of Appeals (APPENDIX 1) on grounds the circuit court has authorized a district court to veer from the accepted and usual course of judicial proceedings to an extent as to constitute a departure from the essential requirements of law thus denying due process, equal protection and other privileges and immunities guaranteed to the plaintiff which has resulted in irreparable harm if not redressed; and because the decisions of both the district and circuit courts are in conflict with law and precedence of the Supreme Court of the United States.

As noted in the complaint, the defendants knew at the time the initial brief was filed in Duncan v. Duncan, 571 So.2d 482 (Fla. 5th DCA 1990) that when the petitioner in the original state court action had attempted to enforce the "final judgment", C. Duncan had beaten it back by proving the judgment was null and void ab initio for want of subject matter jurisdiction and that the trial court had estopped all further attempts to enforce the judgment by declaring it satisfied notwithstanding it allowed withdrawal of the motion for contempt. (APPENDIX 4). This the defendants also knew because the state trial court judge later refused to vacate the

judgment since the defendants had illegally affirmed it but also refused again to allow its enforcement because the trial court never had subject matter jurisdiction. (APPENDIX 5). In Duncan v. Duncan, 590 So.2d 427 (Fla. 5th DCA 1991) the defendants were not only aware of all this but they were also aware that the Florida Supreme Court had seen all this, agreed that the state trial court judgment was null and void ab initio and the state trial court never had jurisdiction, had authorized federal attack and why it had done so, was aware that pursuant to Miller v. Fortune Insurance Co., 484 So.2d 1221, 1224 (Fla. 1986) they were compelled to reverse the lower court's refusal to entertain a motion for relief and that pursuant to Hoffman v. Jones, 280 So.2d 431 (Fla. 1975) this was a mandatory ministerial duty and not a discretionary function.

From the foregoing, the preceding Statement of the Case, and the orders of the district court (APPENDIX 2) and the circuit court (APPENDIX 1), it should be quite clear as to what happened. Since the defendants did not file an answer, they waived the right to raise affirmative defenses and estopped themselves from so doing. However, that is exactly what they did!

Affirmative defenses can only be raised when joined to and included in a pleading. A motion is not a pleading! Rule 8(c), Fed.R.Civ.P., says "In pleading to a preceding pleading, a party shall set forth" the cited defenses "and any other matter constituting an avoidance or affirmative defense." On the other had Rule 12(b), Fed.R.Civ.P., clearly allows for the filing of any one or more specifically stated defenses in a responsive motion in lieu of an answer, but such is limited specifically to those enumerated defenses.

A look at the defendants' motion to dismiss filed in the district court shows that it contains three affirmative defenses and no defenses cited under Rule 12(b). (APPENDIX 6). The defenses cited in numbered paragraphs one and three are on their faces affirmative defenses of judicial immunity and Eleventh Amendment Bar. However, the district court's order says that the plaintiff defeated these on the merits in that it specifically denies the defense of judicial immunity and implies denial of the defense of Eleventh Amendment bar by omission of any verbiage granting it.

This was not appealed by the defendants or the plaintiff and is now moot. (APPENDIX 2).

What the district court erroneously granted and the circuit court affirmed was paragraph 2 of the defendants motion to dismiss which in fact is the affirmative defense of bar to review a final state court decision but which was deceptively labelled as "lack of subject matter jurisdiction" with the apparent intent to mislead the courts.

This Court in Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) defined lack of subject matter jurisdiction. It said that in determining such the court must find that none of the following criteria apply: (1) the cause is not one arising under the Federal Constitution, laws or treaties; (2) the complaint shows that it is not a "case or controversy" within the meaning of the laws as stated in question number one; and, (3) the cause is not described by any jurisdictional statute. That IS the controlling test!

In Baker, U.S. at 199 the court said,

> Dismissal of the complaint upon the ground of lack of jurisdiction of the subject would, therefore, be justified only if that claim were "so attenuated and unsufficient as to be absolutely devoid of merit," Newburyport Water Co. v. Newburyport, 193 U.S. 561, 576, or "frivolous", Bell v. Hood, 327 U.S. 678, 683. That the claim is unsubstantiated must be "very plain," Hart v. Keith Vauderville Exchange, 262 U.S. 271, 274.

This is in accord with other rulings made by this Court on motions to dismiss. In Polk Co. v. Glover, 305 U.S. 5, 9 - 19, 59 S.Ct. 15, 17 - 21, 83 L.Ed. 6, 10 - 16 (1938) this Court held that a motion to dismiss must be denied if it asks the court to dispose of fact raised by the pleadings in advance of trial in due course. Surely due process was denied when the trial court granted validity to state court decisions known to be null and void. In Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1970) this Court held that on a motion to dismiss the judge accept as truth the validity of the allegations of the complaint even if he believes the plaintiff will not prevail at a trial on the merits. This

Court still held this true in Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163, 170 (1980), citing Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972).

In Peoples Natural Gas Co. v. Federal Power Comm., 127 F.2d 153, 157 supra, 75 U.S. App. DC 235 (1942), certiorari denied, 316 U.S. 700, 62 S.Ct. 1298, 86 L.Ed. 1769 the court held that where there are multiple grounds for jurisdiction cited and the defendants do not plead to, deny or challenge each and everyone of them, they admit that the court has jurisdiction under those not challenged. The rationale appears to be that if the court is given authority to hear the merits, it will find that it does have jurisdiction.

In the matter before the district court, the defendants challenged only 42 United States Code Section 1983 so ceded that the district court has jurisdiction under 42 United States Code Section 1985. Further, the defendants argued that the district court could not review final state court decisions but did not argue the issues raised in Baker v. Carr, Id. As such they did not challenge subject matter jurisdiction but attacked the merits which they had already conceded and admitted were true, to-wit: that the state district court of appeal orders are null and void and non-final. As such they admitted that there was no bar to the court's jurisdiction. This is consistent with federal precedence that null and void judgments may not be enforced. Elliott v. Piersol, 1 Pet. 328, 340, 7 L.Ed. 164, 170 (1828); Thompson v. Tolmie, 2 Pet. 157, 161 & 167, 7 L.Ed. 381, 383 & 385 (1829). Granting a bar on null and void judgments is a violation of law. Elliott v. Piersol, Id. This the court must have found out for itself.

The defendants and the district court also appear to have felt that when C. Duncan went to the Florida Supreme Court on a petition for writ of mandamus in Duncan v. Cowart, 584 So.2d 597 (Fla. 1991), such was an appeal notwithstanding that both Florida and federal practice consider such to be a collateral attack. They also argue that the refusal of the Florida Supreme Court to decide the issue amounts to a ruling on the merits that the Florida Supreme Court upholds subversion of the United States Constitution in that it supports civil rights violations. This is a pretty heavy statement and assumption for the district court to make and the circuit court

to uphold without first viewing the record and finding out for itself when the plaintiff claims it is merely a sanction for federal intervention; not to mention it is a ruling on the merits contrary to the requirement that both the defendants and the district court admitted that the averments in the complaint were true. It is also contrary to this Court's constant rulings that actions under United States Code, Title 42, Sections 1983 and 1985 are supplementary to state court actions and refusal of a state court to decide an issue thereunder amounts to a sanctioning for the federal district courts to exercise their original jurisdiction. McNeese v. Board of Education, 373 U.S. 668, 671 - 72, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

Here, again, are seen affirmative defenses to which the plaintiff was entitled to present evidence to refute, particularly when he timely requested it. The plaintiff submits that failure to stick to usual procedure and failure to grant an evidentiary hearing are a violation of due process and equal protection. This Court upheld such in Smart v. Jones,530 F.2d. 64, 65 (5th Cir. 1976), rehearing denied, 532 F.2d 1375, 1376, certiorari denied, 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168, rehearing denied, 429 U.S. 1125, 97 S.Ct. 1166, 51 L.Ed.2d 576 where it was determined that during preliminary proceedings it is proper to allow viewing of state court records "as a means of eliminating possible fact issues."

The plaintiff submits that in both this matter and the action in the district court he is entitled to a hearing or trial on the merits. Amendment 1 of the Constitution of the United States says, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievance." which implies that the petition must be tried on the merits. Such is based in law in that it is Congress and Congress alone which has the power to make all laws necessary to carry out the provision of the Constitution. Art. I S. 8(18). That even applies to court rules: "The Congress shall have power * * * To make rules for the government... ." Art. I S. 8(14), U.S. Const.

Thus when Amendment 14 Section 1 of the United States Constitution grants specific rights such as in the privileges and

immunities clause, the due process clause, and the equal protection clause those rights may not be abridged. To enforce those rights Congress enacted Title 42, United States Code, Sections 1983 and 1985 and it gave the district courts original jurisdiction to hear actions pursuant to Title 28, United States Code, Section 1331 and 1343.

Further, it is Congress who constituted the tribunals inferior to the Supreme Court. Art. I S. 8(9), U.S. Const. And the judicial power is vested both in those inferior courts and the Supreme Court. Art. III S. 1, U.S. Const. The Constitution and the federal law are the supreme law of the land and no state judge may violate it. Art. VI(2), U.S. Const. This Court is in like accord because in Baker at U.S. 200 the court held that violation of a part of the Federal law or Constitution does provide federal jurisdiction to a district court as "defined in Art. III, S. 2, and so within the power of Congress to assign to the jurisdiction of the District Courts."

For these reasons the plaintiff submits that pursuant to Supreme Court Rule 16.1 this Court should summarily reverse on the merits the order of the United States Court of Appeals and remand with instructions to order the district court to reinstate the case and proceed with the issues; alternatively, that pursuant to Supreme Court Rule 16.2 this Court should grant certiorari to allow for further development of these issues and a full determination on the merits.

Respectfully submitted,

Carl J. Duncan
Pro Se

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-2501
Non-Argument Calendar

D. C. Docket No. 92-139-CIV-ORL-19

CARL J. DUNCAN,

Plaintiff-Appellant,

versus

WARREN H. COBB, Judge,
Fifth District Court of Appeals;
JACQUELINE R. GRIFFIN, Judge,
Fifth District Court of Appeals;
CHARLES M. HARRIS, Judge
Fifth District Court of Appeals;
EARLE W. PETERSON, JR., Judge,
Fifth District Court of Appeals;
WINIFRED J. SHARP, Judge,
Fifth District Court of Appeals,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 2, 1993)

Before TJOFLAT, Chief Judge, FAY and BLACK, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: April 2, 1993
For the Court: Miguel J. Cortez, Clerk
By: /s/
Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: May 19, 1993

# # # # # # # #

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARL J. DUNCAN,

Plaintiff,

v. CASE NO. 92-139-CIV-ORL-19

WARRREN H. COBB, et al.

Defendants.

ORDER

This cause was considered upon the following matter:

Defendants' Motion to Dismiss and Memorandum of Law (Doc. No. 5, filed March 9, 1992); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, and Plaintiff's Affidavit in Opposition to Defendant's Motion to Dismiss (Doc. No. 6 and 7, filed March 11, 1992).

Plaintiff brings a Civil Rights Action under 42 U.S.C. §§ 1983 and 1985 against Defendants, all judges of the District Court of Appeal, Fifth District of Florida. Plaintiff seeks injunctive relief mandating Defendants to reverse and vacate the Final Judgment Dissolving Marriage in Duncan v. Duncan, Case No. 89-12080-FD-D, Eighteenth Judicial Circuit, Brevard County. Defendants move to dismiss based on judicial immunity and lack of subject matter jurisdiction.

Plaintiff correctly maintains that judicial immunity does not bar injunctive relief against judicial officers acting in their judicial capacity. Wahl v. McIver, 773 F.2d 1169, 1172 (11th Cir. 1985) (citing Pulliam v. Allen, 466 U.S. 522 (1984). However, under the circumstances of this case, this Court lacks jurisdiction over Plaintiff's action.

"The jurisdiction possessed by district courts is strictly original." Hollins v. Wessel, 819 F.2d 1073, 1074 (11th Cir. 1987) (citing Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923)).[1] Further, review of final judgments of a state court in judicial proceedings is reserved to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257. Id. (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983)). Opportunity to raise federal claims is given to plaintiffs through the appeals process in the state proceedings. Id.

Plaintiff has appealed his case to the Florida Fifth District Court of Appeal. Duncan v. Duncan, 590 So.2d 427 (Fla. 5th DCA 1991); Duncan v. Duncan, 571 So.2d 482 (Fla. 5th DCA 1990). Both cases were appeals from the circuit court of Brevard County that were affirmed without opinion. Plaintiff also petitioned the Florida Supreme Court for writ of mandamus which was denied

---

[1] Hollins v. Wessel, 819 F.2d 1073 (11th Cir. 1987), held that plaintiff's civil rights action against a state court judge who presided over a mortgage foreclosure action in state court during the period in which plaintiff was incarcerated was properly dismissed by the district court for lack of subject matter jurisdiction.

without opinion. Duncan v. Cowart, 584 So.2d 997 (1991).

In Hollins, the Eleventh Circuit dismissed a civil rights action because the federal district court lacked subject matter jurisdiction. Hollins, 819 F.2d at 1074. Like the instant case, the underlying action in the Hollins §1983 action was a review of a state court proceeding. While the Hollins decision does not reflect the grounds which the plaintiff asserted in his appeal in the Florida district court of appeal prior to asserting his civil rights claim in the federal district court, the Eleventh Circuit nevertheless determined that the claim asserted in the federal court should have been made in the state appellate proceeding.

Therefore, on the authority of Hollins, this Court lacks subject matter jurisdiction in this case. Defendants' Motion to Dismiss (Doc. No. 5) is GRANTED, and Plaintiff's claim is dismissed.

DONE AND ORDERED at Orlando, Florida, this 21st day of April, 1992.

/s/
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

# # # # # # # #

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

Civil Action
File Number 92-139-CIV-ORL-19

CARL J. DUNCAN,

Plaintiff,

v.

WARREN H. COBB, et al.,

Defendants.
_____/

PLAINTIFF'S MOTION FOR REHEARING

Plaintiff moves the Court pursuant to

* * * *

(Text omitted as unnecessary. Purpose is to introduce following endorsed order.)

Denied 5-1-92

/s/ Patricia C. Fawsett

# # # # # # # #

IN THE CIRCUIT COURT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 89-12080-FD-D

RITA KAY DUNCAN,

Petitioner,

vs.

CARL J. DUNCAN,

Respondent.
_____/

ORDER

All of the pending Motions by and between the Petitioner and the Respondent together with the Motions separately filed by Petitioner's attorney, having come on for consideration before the undersigned Judge on May 23, 1990, with GEOFFREY GREY STRANGE, ESQUIRE and Respondent, CARL J. DUNCAN, both being present by telephone, and the court having examined the record in this cause and having determined that an Appeal has been filed, and having further advised the parties of the limited jurisdiction of this Court during the pendency of the appeal, and the Court having heard the arguments of the respective parties and being otherwise fully advised, it is

ORDERED AND ADJUDGED as follows:

1. The Court will allow GEOFFREY GREY STRANGE, ESQUIRE, to withdraw as counsel of record for the Petitioner upon mailing to the undersigned Judge for filing with this case a written consent by Petitioner to such withdrawal.

2. Petitioner's attorney, having announced that Respondent has paid him the fees required under the Final Judgment, has withdrawn the Motion for Contempt and eliminated the necessity of the hearing thereon.

3. The Motion by Petitioner's attorney to tax additional fees and costs against the Respondent because of the Respondent's post-judgment motions and the like should be, and the same is, hereby denied.

4. Respondent's Motion for fees and expenses post-judgment is likewise denied.

5. All of the other Motions and requests for relief pending at this time should be, and the same are, hereby each denied.

DONE AND ORDERED in Chambers at Rockledge, Brevard County, Florida, the 23rd day of May, 1990.

/s/
EDWARD M. JACKSON
Circuit Judge

Copies furnished to:

Geoffrey Grey Strange, Esquire
1250 Eau Gallie Blvd., Suite G
Melbourne, Florida 32935

Carl Duncan
459 Inkwood Lane
Tallahassee, Florida 32310

Rita Kay Scott
c/o Winner Validation
250 Merriott Drive
Tallahassee, Florida 32399-4027

/s/
Hilder W. Bailey
Judicial Assistant

# # # # # # # #

IN THE CIRCUIT COURT IN AND
FOR BREVARD COUNTY, FLORIDA

CASE NO. 89-12080-FD-D

RITA KAY DUNCAN,
n/k/a RITA KAY SCOTT,

Petitioner,

vs.

CARL J. DUNCAN,

Respondent.
_____/

ORDER OF DISMISSAL

Various motions by the Respondent, CARL J. DUNCAN, having come on for consideration before the undersigned Judge on March 27, 1991 and the Court having reviewed the record in this cause and having heard the presentations by the Petitioner and Respondent, and being otherwise fully advised in the premises, finds that the Court does not have any subject matter jurisdiction over matters presented by the Respondent.

The premises considered, it is

ORDERED AND ADJUDGED as follows:

1. The Court dismisses the post-judgment matters presented by the Respondent for lack of subject matter jurisdiction, without prejudice to the Respondent presenting these matters to another Court.

2. The Final Judgment has been entered in this cause and the same affirmed by the District Court of Appeal for the Fifth District, thereby depriving the Court of jurisdiction as to the matters asserted by the Respondent.

DONE AND ORDERED in Chambers at Rockledge, Brevard County, Florida, this 29th day of March, 1991.

/s/
EDWARD M. JACKSON

Circuit Judge

Copies furnished to:

Carl J. Duncan
459 Inkwood Lane
Tallahassee, Florida 32310

Rita Kay Scott
3004 Morningside Drive
Tallahassee, Florida 32301

Geoffrey Strange, Esquire
1250 Eau Gallie Blvd., Suite G
Melbourne, florida 32935

/s/
Hilder W. Bailey
Judicial Assistant
Date: 4-1-91

# # # # # # # #

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

CARL J. DUNCAN,

Plaintiff,

Civil Action
File No. 92-139-CIV-ORL-19

v.

WARREN H. COBB,
JACQUELINE R. GRIFFIN,
CHARLES M. HARRIS,
EARLE W. PETERSON, JR.,
and WINIFRED J. SHARP,

Defendants.

_____/

MOTION TO DISMISS

DEFENDANTS, WARREN H. COBB, JACQUELINE R. GRIFFIN, CHARLES M. HARRIS, EARLE W. PETERSON, JR. and WINIFRED J. SHARP, by undersigned counsel, respectfully move this court to enter an order dismissing this cause on the following grounds:

1. These defendants, all judges of the District Court of Appeal, Fifth District of Florida, are sued for alleged acts or omissions arising solely from their judicial offices. Thus, these defendants are entitled to the protection of the doctrine of absolute judicial immunity.

2. This court lacks subject matter jurisdiction.

3. This action is barred by the provisions of the Eleventh Amendment to the Constitution of the United States.

In compliance with Local Rule 3.01(a), defendants submit the following legal memorandum in support of this motion:

MEMORANDUM OF LAW

1. JUDICIAL IMMUNITY

It is well-settled principle of law, derived from the common law of England, that judges are immune from civil liability for acts performed in the course of their official functions. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872); *Meredith v. Van Oosterhout*, 286 F.2d 216 (8th Cir. 1960), cert. denied, 365

U.S. 835, 81 S.Ct. 749, 5 L.Ed.2d 745. In *Pierson v. Ray*, 386 U.S. 465, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the United States Supreme Court has since reaffirmed and elucidated the doctrine of judicial immunity, expressly holding that the Civil Rights Act of 1871, now 42 U.S.C. § 1983, under which this cause was brought, did not abolish judicial immunity. In *Pierson*, the Court reasoned as followed:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L.Ed 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences... . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

386 U.S. at 553-54

More recently, in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), *reh. denied*, 436 U.S. 951, 98 S.Ct. 2862, 56 L.Ed.2d 795, the Supreme Court reversed and remanded a decision of the United States Court of Appeals for the Seventh Circuit which held a judge of an Indiana court of general jurisdiction was not immune from a § 1983 suit under the doctrine of

judicial immunity for granting a mother's petition to have her minor daughter sterilized. The Supreme Court held the judge immune from liability for damages even if the judge's approval of the petition was in error, where, in view of the state court's broad general jurisdiction under state statutes, the judge had jurisdiction to act on the petition and did not act in the clear absence of all jurisdiction, there being no state statute or case law prohibiting the court from considering petitions for sterilization presented by the parents of minors. The Court further held that neither any procedural errors the judge may have committed not the lack of a special statute authorizing his approval of the sterilization petition renders him liable in damages. There the Court said:

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction. 13 Wall, at 351, 20 L.Ed. 646.

435 U.S. at 356

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in Bradley, 13 Wall, at 357, 20 L.Ed. 646, where it stated: [T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever...

455 U.S. at 359

> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e.,

> whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

435 U.S. at 362.

In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), and *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), *reh. denied*, 399 U.S. 937, 90 S.Ct. 2248, 26 L.Ed.2d 809, the Court acknowledged the importance of judicial immunity and the need for total and absolute independence of judges in deciding cases or in any phase of the decisional process.

Other examples of the application of the doctrine of judicial immunity are *Moses v. Parwatikar*, 813 F.2d 891, 892-93 (8th Cir. 1987) (allegations that judge conspired with state officials was not sufficient to defeat absolute immunity of judge); *Eades v. Sterlinske*, 810 F.2d 723, 725-26 (7th Cir. 1987) (alleged acts of judge in dictating false certificate and causing alteration of trial transcript and docket sheet were entitled to absolute immunity); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (judicial immunity is unaffected by the motives with which the judicial acts are performed); *Eitel v. Holland*, 787 F.2d 995, 998 (5th Cir. 1986) ("A judge is not liable in damages for her judicial acts, even those done maliciously or corruptly, unless she acts in the clear absence of all jurisdiction"); *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985) (judge immune from §1983 action alleging use of his judicial office to gain control of oil company even though many of his judicial acts were performed outside the courtroom); *Brinkman v. Johnston*, 793 F.2d 111 (5th Cir. 1986); *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986) (judge entitled to absolute immunity despite allegations that she was prejudiced against males and openly discussed the litigation involving the plaintiff at cocktail parties and functions; double costs and attorney fees awarded against plaintiff on appeal); and *Adams v. McIlhany*, 764 F.2d 294 (5th Cir. 1985) (judge who held mother in contempt of court for letter she wrote him intimating that he had dealt with her son harshly because she

could not afford to pay bribe, entitled absolute immunity).

2. LACK OF SUBJECT MATTER JURISDICTION

From a reading of Plaintiff's Complaint, it appears that he is seeking an order from this Court reviewing and reversing an action of a Florida appellate Court. With due respect, this Court lacks jurisdiction over that subject matter.

> While the lower federal courts were given certain powers in the 1789 [anti-injunction] Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in [The Supreme] Court of the federal questions raised in either system.

Atlantic Coastline R. Co. v. Brotherhood of Loc. Eng., 398 U.S. 281, 286, 90 S.Ct. 1739, 1743 (1970).

> It is well settled that federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923); *Fortune v. Mulherrin*, 533 F.2d 21 (1st Cir.) cert. denied, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d 143 (1967); *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974). Where a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. §1983 (1982). *Sunn v. Dean*, 597 F.Supp. 79, 80 (N.D. Ga. 1984).

Anderson v. State of Colorado, 793 F.2d 262, 263 (10th Cir. 1986).

While it is true that "a State Court Judgment which violates settled legal principles may run afoul of the guarantees of the due process clause, especially [where] such a judgment has the effect of taking property from a citizen ...," *Reynolds v. State of Georgia*, 640 F.2d 702, 705 (5th Cir. Unit B 1981) (citations omitted), cert. denied, 454 U.S. 865, 102 S.Ct. 326, 70 L.Ed.2d 165 (1981), it is clear from the body and prayer of plaintiff's Complaint that he seeks appellate review in this Court of state court actions. The jurisdiction of a federal district court is original. The Constitution grants no power to this Court to "revise and correct the proceedings in a cause [originally brought in state court] ... ." *Malbury v. Madison*, 5 U.S. (1 Cranch) 137, 175, 2 L.Ed. 60 (1803), cited in *Reynolds v. State of Georgia, supra* at 707. Plaintiff's attempt to ground his claim upon Section 1983 is likewise ineffective to vest this Court with what is essentially appellate jurisdiction. *Am. Furniture Co. v. Intern Accommodation Supply*, 721 F.2d 478, 482 (5th Cir. 1981); *Lampkin-Asam v. Supreme Court of Florida*, 601 F.2d 760 (5th Cir. 1979).

The above-cited case law is grounded on notions of federalism found in the United States Supreme Court's jurisdiction to review decisions of a state supreme court for alleged errors of federal law. *Wood v. Orange County*, 715 F.2d 1543, 1545 (11th Cir. 1983), citing *Rooker v. Fidelity Trust Co.*, 203 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court reaffirmed *Rooker's* holding that federal district courts are prohibited from considering federal issues raised and inextricably intertwined in state court proceedings. The Supreme Court in *Feldman* also held that review is prohibited even to the United States Supreme Court where the plaintiff failed to raise his federal claim in state court, if an opportunity to raise such a claim existed. Here, Plaintiff does not allege that he raised any federal constitutional claims in the state courts. Accordingly, his present cause may properly be dismissed with prejudice, because United States Court review is barred.

3. ELEVENTH AMENDMENT BAR.

Where a party asks a federal court to declare a state court

judgment null and void, we should consider this as praying for an injunction enjoining its enforcement." *Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) at 1236. This Court, however, lacks power to issue such an injunction. The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State ... ." Although "the Amendment by its terms does not bar suits against a State by its own citizens, [the Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Florida has not consented to this type of lawsuit. Moreover, it is settled law that "the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction," and will bar an injunction against that state whether or not the plaintiff seeks money damages. *Cory v. White*, 102 S.Ct. 2325, 2329 (1982). Thus, the Eleventh Amendment bars this Court from entertaining a suit for the "injunction" that plaintiff seeks against the state courts of Florida.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/
RIVERS BUFORD, JR.
Assistant Attorney General
Florida Bar No. 0010070

DEPARTMENT OF LEGAL AFFAIRS
Suite 1501 - The Capitol
Tallahassee, FL 32399-1050
(904) 488-1573
(FAX) (904) 488-4872

# # # # # # # #

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CARL J. DUNCAN, 459 Inkwood Iane, Tallahassee, Florida, 32310 this 3rd day of March, 1992.

/s/
RIVERS BUFFORD, JR.

<rivers>Duncan/MD

# # # # # # # #

Act of Dec. 29, 1979, Pub. L. 96-170, s. 2, 93 Stat. 1284, U.S.C., Title 28, s. 1343(a):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) [B]ecause of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United

States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) [T]o secure equitable or other relief under any Act of Congress providing for the protection of civil rights... ."